



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

January 6, 2003

Mr. Paul C. Sarahan  
Director  
Litigation Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2003-0096

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174490.

The Texas Commission on Environmental Quality (the "commission") received a request for all documents regarding "Degussa-Huls Corporation Carbon Black Plant-Aransas Pass," including all confidential documents. You advise that you have released some of the requested information. You claim that some of the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. With respect to the balance of the submitted information, you state that it may be confidential under section 552.101 or excepted under section 552.104, but make no arguments and take no position as to whether the information is so excepted from disclosure. You inform this office that you have notified Degussa-Huls, the third party whose proprietary interests may be implicated by the request, of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). This office has received a response from an attorney for Degussa-Huls objecting to the release of its

information. We have considered all arguments and have reviewed the submitted representative sample of information.<sup>1</sup>

We first note that the purpose of section 552.104 is to protect the interests of a governmental body, usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). You have not submitted any arguments in support of your claim that some information may be excepted under section 552.104 of the Government Code. Therefore, you have waived any claim under this exception. Gov't Code §§ .301, .302.

We next address the arguments submitted to this office by Degussa-Huls in relation to its information. Degussa-Huls first argues that this office ruled in Open Records Letter No. 1999-3053 (1999) that the same information is confidential under section 382.041 of the Health and Safety Code, and therefore, a previous determination is applicable to its information. As discussed below, however, this office has determined that, pursuant to federal law, a portion of its information may not be withheld under that provision. Therefore, Degussa-Huls' information may not be withheld pursuant to a previous determination. *Cf.* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that the information is or is not excepted from disclosure).

Alternatively, Degussa-Huls claims that the information it provided to the commission is excepted under sections 552.101 and 552.110 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that another statute makes confidential. Degussa-Huls believes that the information at issue is confidential under section 382.041 of the Health and Safety Code. Section 382.041 provides in relevant part that "a member, employee, or agent of [the commission] may not disclose information submitted to [the commission] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). This office has concluded that section 382.041 protects information that is submitted to the commission if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential in submitting it to the commission. *See* Open Records Decision No. 652 (1997).

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<sup>1</sup> We assume that the "sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The commission informs us that the information at issue was designated as being confidential when it was submitted to the commission.

Degussa-Huls claims that the information at issue constitutes a trade secret under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Under section 757 of the Restatement of Torts, a "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . *A trade secret is a process or device for continuous use in the operation of the business.* Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

The following six factors are relevant to the determination of whether information qualifies as a trade secret under section 757 of the Restatement of Torts:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;

- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision No. 232 (1979).

Degussa-Huls informs this office that the information at issue contains process and/or production information that relates to the operations of Degussa Engineered Carbons, L.P. Degussa-Huls argues that this information satisfies the six indicia of a trade secret under section 757 of the Restatement of Torts and thus qualifies as a trade secret for purposes of section 552.110(a) of the Government Code. Having considered Degussa-Huls' arguments, we find that the company has established a *prima facie* case that the information qualifies as a trade secret under section 552.110(a). We have received no arguments that rebut Degussa-Huls' position as a matter of law.

We note, however, that the documents at issue contain information relating to emissions. Under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualify as trade secret information. *See* 42 U.S.C. § 7414(c). Thus, to the extent that the documents contain any information that constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information in accordance with the federal law. The rest of the information in Enclosure 3 is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code.<sup>2</sup>

We now turn to the commission's claim that information contained in Enclosure 4 is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--

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<sup>2</sup> We note that Degussa-Huls seeks to withhold information it has submitted as "Exhibit A." The information submitted to this office by the commission as Enclosure 3 is virtually identical. However, the information submitted by Degussa-Huls contains a small amount of information that is not contained in the information submitted by the commission for review. Therefore, this ruling does not address this information, and is limited to the information submitted as responsive by the commission. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested, or representative sample if voluminous amount of information was requested).

Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

You indicate that Enclosure 4 contains information consisting of interagency and intraagency memoranda relating to orders and compliance information. After reviewing the information in Enclosure 4, we find that none of it constitutes internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the commission. Therefore, you may not withhold any of this information under section 552.111.

Next, we address the commission's claim under section 552.101 in conjunction with the informer's privilege. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Texas courts have recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You state that Enclosure 4 contains information identifying individuals who have made complaints relating to conditions which would constitute violations of nuisance provisions, permit conditions, opacity limitations, and emissions restrictions. You state that the complaints involves violations of section 382.085 of the Health and Safety Code at a minimum. You further state that the complaints were filed with the commission, which has authority under the Water Code to seek penalties for such violations. Based on your representations and our review of the information, we conclude that you may withhold

the information identifying complainants in Enclosure 4 under section 552.101 in conjunction with the informer's privilege. *See* Open Records Decision No. 156 (1977) (name of person who makes complaint about another individual to city's animal control division is excepted from disclosure by informer's privilege so long as information furnished discloses potential violation of state law). We have marked this information.

You further claim that the information submitted as Enclosure 5 is excepted under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a). Contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation under section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You state that the information at issue pertains to a pending enforcement action initiated by the commission against the Carbon Black Plant that is the subject of the request for information. You state that the enforcement action may be resolved through settlement, administrative hearing, or trial. Based on your representations and our review of the submitted information, we conclude that the commission has demonstrated that litigation is reasonably anticipated. Furthermore, we find that the information in Enclosure 5 is related to the anticipated litigation for purposes of section 552.103.

Thus, you may withhold this information from the requestor under section 552.103. However, we note that if the opposing party in the litigation has seen or had access to any of this information, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). As section 552.103 is dispositive for Enclosure 5, we do not address your apparent claim under section 552.111 in relation to any of this information.

In summary, the commission must withhold the information in Enclosure 3 under section 552.101 in conjunction with section 382.041 of the Health and Safety Code, with the exception of any information that constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code. You may withhold the information we have marked in Enclosure 4 under section 552.101 in conjunction with the informer's privilege. You may withhold the information in Enclosure 5 under section 552.103. The remaining requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Kristen Bates".

Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 174490

Enc. Submitted documents

c: Ms. Sharon Emerson  
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(w/o enclosures)